103-1800-10816-2

STATE OF MiNNESOTA
OFFICE OF ADMINISTRATiVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the SIRS Appeal of United Nursing and Health Care Services, Inc.

RECOMMENDED ORDER FOR SUMMARY DISPOSITION

By a written motion filed June 13, 1997, the Minnesota Department of Human Services ("Department") seeks a recommendation for summary disposition in this matter. United Nursing and Health Care Services, Inc. ("United Nursing") filed a Memorandum in Opposition and a Cross Motion for Summary Disposition on July 11, 1997. The Department filed a Reply to the Cross Motion for Summary Disposition on July 24, 1997. United Nursing filed a Reply on August 11, 1997. Arguments on the motions were heard on August 15, 1997.

The Department was represented by Assistant Attorney General Robert V. Sauer, 445 Minnesota Street, Suite 900, St. Paul, MN *55* 101-2127. United Nursing was represented by Kimberly K. Otte and John M. Broeker of Halleland, Lewis, Nilan, Sipkins & Johnson P.A., Pillsbury Center South, Suite 600, 220 South Sixth Street, Minneapolis, MN *55402-4501.*

Based upon the memoranda filed by the parties, all of the filings in this case, and for the reasons set out in the Memorandum which follows:

IT IS HEREBY RECOMMENDED: that the Commissioner of Human Services grant a summary disposition of this matter in favor of the Department of Human Services.

Dated this 8th day of September, 1997

/s/ Barbara F. Goldstein
BARBARA F. GOLDSTEIN
Administrative Law Judge

MEMORANDUM

The Department and United Nursing have made cross motions for summary disposition of this matter. Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate when there is no genuine issue of material fact and one party is entitled to judgment as a matter of law. Mm. Rule Pt. 1400.5500(k); Minn R. Civ. P. 56.03.

A genuine issue of material fact is one which is not sham or frivolous and a material fact is one which will effect the outcome of the case. Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W. 2d 804, 808 (Minn. Ct. App. 1984), rev, denied (Minn. Feb. 6, 1985).

In this matter, the parties agreed to a stipulated set of facts which was presented to the Administrative Law Judge. The facts as set forth here are presumed to be true for the purposes of this recommendation. The issue raised is a question of law and properly subject to cross-motions for summary disposition.

United Health Care Services is a personal care provider organization which provides personal care services to recipients eligible for Medical Assistance. Kristine Kiose is a twelve year old disabled child. Kathleen Cripps is her Mother who cares for her.

The Minnesota Department of Human Services is responsible for administering the Medical Assistance Program in Minnesota. The Surveillance and Integrity Review Section is part of the Department and is charged with auditing and investigating the appropriateness of payments to providers of Medical Assistance services.

United Nursing appealed from a decision of the Department to seek reimbursement of $30,932.64 from United Nursing of Medical Assistance funds which were paid for care provided to Kristine Klose, a child with severe mental retardation, physical disabilities, cerebral palsy and other disabilities. Kristine is dependent for many activities of daily living and requires supervision at all times. These services were provided to Kristine in her home and are personal care services which were reimbursed by Medical Assistance.

From September 16, 1991 through March 13, 1994, (“the relevant period”) there were no physician’s orders in Kristine’s file to provide these services to her. This is the reason the Department seeks the reimbursement. United Nursing did not provide personal care services to Kristine after March 26, 1994.

It is agreed by the parties that the services were actually provided to Kristine during the relevant period. She received the care of a personal care attendant (PCA). It is also agreed that the services were medically necessary. What is in dispute is the effect of providing these services without a physician’s order.

The only evidence of physician’s orders in the file are three progress notes written by United Nursing’s employees. They read as follows:

a. Dated February 27, 1991: “D.O. received for P.C.A through United Nursing +H.C.S. re: to D.O. sheet.”

b. Dated March 25,1992: “Phone call made to Dr. office for written order for PCA care to be forwarded to office of United Nursing”

c. Dated April 1, 1993: “Dr’s RN to make sure that V/O for PCA care, written and sent to United Nursing office for verification and placed in patient *files.”*

While these three notes are for each of the years in question, there was no further
elaboration on their meaning by the persons writing them. The only recollections were based on the notes themselves, and there were no independent recollections of doctor’s orders. Orders were not found in United Nursing’s files or in the doctor’s files.

There was an order in the doctor’s files, dated March 14, 1994, signed by Dr. Debra Magnuson on a prescription form from the medical group which provided Kristine’s care, Metropolitan Pediatric Specialists. Dr. Thomas R.Stealey, Kristine’s regular physician, did not recall giving any orders during the period in question, nor did he find any orders for that period in his file. He did have physician’s orders in his file for the periods before and after the relevant period. He acknowledged Dr. Magnuson’s order on March 14, 1994.

On April 3, 1997, at the request of United Nursing, he signed a retroactive order which said: “I authorize PCA services for Kristine Klose for the period 2-27-9 1 through 3-13-94”

On October 26, 1994, Anthony Ali, administrator and owner of United Nursing, sent a letter to Kristine’s Mother, Kathleen Crips, stating that United Nursing would discontinue providing personal care services to Kristine as of October 28, 1994. There is nothing in the record to indicate that this decision to stop providing services had anything to do with the lack of physician’s orders.

On October 28, 1994, Ms. Crips called Thomas L. Newmann, a senior investigator with the Surveillance and Integrity Review Section of the Department and expressed concern with the manner of termination of services and her treatment as a client. At Mr. Newmann’s request, she followed this up with a letter to him restating her concerns.

Mr. Newmann responded to Ms. Crips that he would follow up to be sure that United Nursing’s billing was consistent with the services provided, but that SIRS could not address her other issues.

On November 9, 1994, Mr. Newmann sent a letter to United Nursing stating that he would conduct a review of services provided to Kristine. He requested that information relating to Kristine be made available to him at a site visit to be held November 15, 1994. The information he requested included nursing notes, dates of service, staff time records, physician certifications and employee records.

At the site visit on November *15,* 1994, Mr. Newmann was unable to find physician’s orders for the relevant period in the file. He told the staff that if they were

unable to find the orders, SIRS would seek to recover the funds paid for the personal care services for the relevant period. That afternoon the staff of United Nursing informed him that they had been unable to locate physician's orders for personal care services for Kristine for the relevant period. To date no such orders have been found, although the progress notes, discussed above, were located and provided to Mr. Newmann.

On November 16, 1994, Mr. Newmann sent United Nursing a notice of agency action stating that the Department of Human Services would recover $30,932.64 in Medical Assistance funds paid for Kristine Kiose during the relevant period. United Nursing appealed the proposed recovery by letter dated December 8, 1994. This was followed by informal discussions and a further search for the physician's orders in Dr. Stealey's files and in materials held by Kristine's mother, Kathleen Crips. No doctor's orders were located.

THE LEGAL ISSUES

The requirement that there be physician's orders to support Medical Assistance payments is statutory.

Minnesota Statutes Section 256B.0627(l)(c) says: '"Home care services" means a health service, determined by the commissioner as medically necessary, that is ordered by a physician and documented in a care plan that is reviewed by the physician at least once every 60 days for the provision of home health services, or private duty nursing, or at least once every 356 days for personal care. Home care services are provided to the recipient at the recipient's residence that is a place other than a hospital or long-term care facility or as specified in section 256B.0625.'

Kristine Kiose was receiving home care pursuant to the provision above. A physician's order was necessary to support this service, and had to be reviewed at least once a year. While the evidence in the progress notes shows that the provider began the process to obtain a physician's order during each of the years in question, the fact remains that no physician's order has been located for each of the years in the relevant period.

The Department took action to recover the funds from United Nursing under Minnesota Statute Sec. 256B.064 and Minnesota Rules 9505.0180, *9505.0465* and 9505.2 160 to 9505.2245. Section 256B.064 is the Ineligible Provider statute. It permits the Commissioner to recover funds determined to be ineligible payments.

The operative section stated, before a recent 1997 amendment:

"Subd. la. Grounds for monetary recovery and sanctions against vendors. The commissioner may seek monetary recovery and impose sanctions against vendors of medical care for any of the following: Fraud, theft, or abuse in connection with the provision of medical care to recipients of public assistance; a pattern of presentment of false or duplicate claims or claims for services not medically necessary; a pattern of making false statements of material facts for the purpose of obtaining greater compensation than that to which the vendor is legally entitled;

Subd. id. Investigative costs. The commissioner may seek recovery of investigative costs from any vendor of medical care or services who willfully submits a

claim for reimbursement for services the vendor knows, or reasonably should have known, is a false representation and which results in the payment of public funds for which the vendor is ineligible. Billing errors deemed to be unintentional, but which result in overcharges, shall not be considered for investigative cost recoupment."

Under the statute as it existed prior to the 1997 amendment, the basic thrust was for intentional acts which caused Medical Assistance to be improperly paid because of the actions of the vendor. United Nursing argues that the failure to obtain physician's orders does not fit into this statute dealing with fraud, theft, abuse and false claims. This is especially true when the services were provided and were medically necessary.

Further, the Minnesota Legislature amended the Ineligible Provider statute during the 1997 legislative session, to include unintentional acts and erroneous payments of Medical Assistance.

The new Section (1)(c) of M.S.A. Section 256B.064 now reads

"Subd. ic. Methods of monetary recovery. The commissioner may obtain monetary recovery from a vendor who has been improperly paid either as a result of conduct described in subdivsion la or as a result of a vendor or department error, regardless of whether the error was intentional. The commissioner may obtaln monetary recovery using methods, including but not limited to the following: assessing and recovering money improperly paid and debiting from, future payment any money improperly paid. Patterns need not be proven as a precondition to monetary recovery of erroneous or false statements. The commissioner shall charge interest on money to be recovered if the recovery is to be made by installment payments or debits, except when the monetary recovery is of an overpayment that resulted from a department error."

The 1997 amendment does not retroactively apply to this case. United Nursing argues that the amendment demonstrates that erroneous payments could not be collected prior to this amendment, and therefore the statute is inapplicable to this case.

However, there is some language in the original statute to convey the coverage of unintentional error as well as intentional acts prior to the amendment. It appears in the section on investigative costs where these costs are not to be applied to "billing errors deemed to be unintentional." The idea of unintentional errors was part of the recovery system prior to 1997.

Also, Minnesota Rules *995.0465,* subpt 1 , which has not been revised, permits recoupment of funds, even for unintentional errors. This rule was promulgated in 1987, well before the relevant period considered here. The rule states:

"The department shall recover medical assistance funds paid to a provider if the department determines that the payment was obtained fraudulently or erroneously. Monetary recovery under the medical assistance program is permitted for the following:

A. intentional and unintentional error on the part of the provider or state or local welfare agency:

B. failure of the provider to comply fully with all authorization control requirements, prior authorization procedures, or billing procedures.;

C. failure to properly report third-party payments; and

D. fraudulent or abusive actions on the part of the provider."

It is clear that the Minnesota Rules *9505.0465* permits recovery of funds based on an unintentional error on the part of the provider. While the language permitting

recovery for error was not put into the Minnesota statute Sec. 256B.064 until 1997, after the relevant period, the rule is supported by other legislation which did exist during the relevant period.

Home care services were first offered in the Minnesota Medical Assistance program in 1983. The Minnesota rule on recovery was promulgated in 1987. It was properly based on powers given to the Department under then existing statue M.S. A. 256B.04. This statute was in effect prior to 1991 giving the Commissioner the power to "adopt permanent rules to implement, administer and operate personal care services." Subdivision
16.

The current statute, amended in 1991 says in Subdivision 1, "The State agency shall: Supervise the administration of medical assistance for eligible recipients by the county agencies hereunder." It then goes on to itemize the additional specific powers of the agency.

In any event, this statute was in effect and gave the commissioner adequate power to promulgate the administrative rule relied on here, Minnesota Rules, 9505.0465. That being the case, the Department has the power and authority to recover the medical assistance funds where there was no physician's order to support the payment of funds. The 1997 amendment can be viewed as a clarification of the powers of the Department which already existed in pnor law and rules.

In addition to the statue and the rule, the information that a physician's order is necessary to receive home care payments under Medical Assistance, is given to all providers in the Medical Assistance Manual provided by the Department. It is updated quarterly.

The Department also argued that the activity of billing without a physician's statement is a form of abuse under the unamended version of M.S.A. 256B.064 and the rules.

Minn. Stat. Section 256B.064 and Minn. Rules 9505.1750 to 9505.2150 (1991) defines abuse: "Abuse" means a pattern of practice by a provider. ..which is inconsistent with sound fiscal, business or medical practices, and results in unnecessary costs to the programs.. .Abuse is characterized, but not limited to, the presence of one of the following conditions:

C. The repeated submissions of claims by a provider for health care which is not reimbursable under the programs...."

Beginning the process to obtain a physician's order, but failing to do so, demonstrates inattention to the rules and lack of follow-up. This is certainly poor organization, but it does not rise to the level of abuse, particularly where the services were medically necessary and were provided.

The facts in this matter clearly show that there were no physician's orders for Kristine Kloss during the relevant period. The importance of these orders is that they

accompany an annual review of the plan for the recipient by the physician. That is what the statute requires. In the absence of orders, it is possible that the plan may not have been reviewed which would work to the detriment of the needy recipient. It is also argued by the Department that the orders provide a reasonable method to allow state and federal agencies to insure prudent, responsible administration of the Medical Assistance program, by insuring appropriateness of services and eligibility for payment.

The equities in this case as well as the statutes support the action taken by the Department.

BFG